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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LA CUNA DE AZTLAN SACRED SITES PROTECTION CIRCLE ADVISORY COMMITTEE; CALIFORNIANS FOR RENEWABLE ENERGY; ALFREDO ACOSTA FIGUEROA; PHILLIP SMITH; PATRICIA FIGUEROA; RONALD VAN FLEET; CATHERINE OHRIN-GREIPP, RUDY MARTINEZ MACIAS, and GILBERT LEIVAS,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; KEN SALAZAR, in the official capacity of Secretary of the United States Department of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; ROBERT ABBEY, in the official capacity of Director of the United States Bureau of Land Management; TERI RAML, in the official capacity of District Manager of the California Desert District of the United States Bureau of Land Management; JOHN KALISH, in the official capacity of Field Manager of the Palm Spring South Coast Field Office of the United States Bureau of Land Management; UNITED STATES

Case No. 5:11-cv-01478-GW-SS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GENESIS SOLAR LLC'S MOTION TO RECOVER FEES AND COSTS INCURRED IN THE PREVIOUSLY DISMISSED ACTION AND STAY THE PROCEEDING

[FRCP 41(d)]

Date: February 9, 2012
Time: 8:30 a.m.
Courtroom: 10
Judge: Hon. George H. Wu

[Notice of Motion and Motion; Declaration of Kristopher S. Davis; and [Proposed] Order, filed concurrently herewith]

DEPARTMENT OF ENERGY; STEVEN CHU, in the official capacity of Secretary of the United States Department of Energy; UNITED STATES TREASURY; TIMOTHY F. GEITHNER, in the official capacity of Secretary of the United States Treasury; FEDERAL FINANCING BANK; and GENESIS SOLAR LLC,

Defendants.

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I.

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure ("Rule") 41(d), defendant Genesis Solar LLC ("Genesis Solar") moves for an order requiring Plaintiffs to pay Genesis Solar's fees and costs incurred in the previously dismissed action, and staying this action until Plaintiffs have complied. Plaintiffs' sharp tactics and improper forum shopping concerning their previously dismissed case, *La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee, et al. v. United States Department of Interior, et al.*, United States District Court, Southern District of California, Case No. 10CV2664-WQH-WVG (the "La Cuna I Action"), warrants relief under Rule 41(d).

The facts supporting this motion are straightforward. On November 3, 2010, the Bureau of Land Management ("BLM") issued the Record of Decision ("ROD") for the Genesis Solar Energy Project ("Genesis Project"). No challenges were made at that time. On December 15, 2010, in *Quechan Tribe of the Fort Yuma Indian Reservation v. United States*, Case No. 10cv2241-LAB(CAB) ("Quechan Tribe Action"), the Southern District of California Court preliminarily enjoined the Imperial Valley Solar Project ("Imperial Project"), a solar project that is completely unrelated to the Genesis Project.

On December 27, 2010, in a calculated attempt to piggy-back on the injunction granted in the Quechan Tribe Action, Plaintiffs filed the La Cuna I Action against six solar projects: the Genesis Project; the Ivanpah Solar Electric Generating System Project ("Ivanpah Project"); the Calico Solar Project ("Calico Project"); the Blythe Solar Power Project ("Blythe Project"); the Chevron Energy Solutions Lucerne Valley Solar Project ("Chevron Project"); and the Imperial Project. As stated, the Imperial Project was already subject to a preliminary injunction in the Southern District. Indeed, the Imperial Project is the only project that was properly venued in the Southern District. The other five projects,

including the Genesis Project, are in the Central District of California, and the events giving rise to the claims with regard to the other five projects occurred in the Central District.

On December 30, 2010, just hours before the New Year's Holiday and almost 60 days after the Genesis Project ROD was issued, Plaintiffs filed an application for a temporary restraining order which sought to enjoin any further activity on these six completely separate, geographically diverse, solar energy projects (the "TRO Application"). The inappropriateness of this tactic is underscored by the fact that Plaintiffs sought a TRO against the Imperial Project even though the court had enjoined that project 12 days earlier in the Quechan Tribe Action.

Genesis Solar was permitted to intervene as a defendant in the La Cuna I Action, and, on January 3, 2011, filed an opposition to the TRO Application and a motion to dismiss the action for improper venue. The court set an expedited briefing schedule.

On January 13, 2011, without dismissing the La Cuna I Action, or informing any party or the court, Plaintiffs filed an identical case in the Central District against the Genesis Project (as well as the Ivanpah and Blythe Projects) titled *La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee, et al. v. United States Department of Interior, et al.*, United States District Court, Central District of California, Case No. 2:11-CV-00400-DMG-DTB (the "La Cuna II Action"). Indeed, on January 14, 2011, Plaintiffs filed their opposition to the motion to dismiss in the La Cuna I Action and effectively conceded that the claims against Genesis Solar were improperly venued in the Southern District. Nowhere in their opposition did Plaintiffs mention that they already had filed the La Cuna II Action in the Central District.

On January 14, 2011, pursuant to the court's scheduling order, Genesis Solar filed a supplemental opposition to the TRO Application, and, on January 21, 2011,

Genesis Solar filed a reply brief in support of the motion to dismiss. It was not until that day, January 21, 2011, that the Plaintiffs informed the La Cuna I Court and the parties that they would not pursue their claims in the Southern District after all.[1]

On January 25, 2011, the Southern District entered Plaintiffs' voluntary dismissal of Genesis Solar without prejudice. The court expressly authorized Genesis Solar to seek its costs incurred in any court that Plaintiffs filed another similar action against Genesis Solar under Rule 41(d). Accordingly, Genesis Solar filed a Rule 41(d) motion against Plaintiffs in the La Cuna II Action.

The Rule 41(d) motion never had an opportunity to be heard in the La Cuna II Action, however. The La Cuna II Action was transferred to this Court because it was deemed related to *California Unions for Reliable Energy, et al. v. United States Department of the Interior, et al.*, United States District Court, Central District of California, Case No. 2:10-CV-9932-GW-SSx (the "CURE Action"). This Court promptly granted a motion to sever the claims against the Genesis Project and the Blythe Project, which effectively dismissed the case as against the Genesis Project and Blythe Project (leaving only the Ivanpah Project in the La Cuna II Action). In its Order, this Court expressly stated that "the ruling is made 'no harm, no foul' as to all parties on both sides," and that Genesis Solar could re-file its Rule 41(d) motion pertaining to the La Cuna I Action if Plaintiffs were to re-file against Genesis Solar. On September 15, 2011, Plaintiffs re-filed against Genesis Solar, and, Genesis Solar, accordingly re-filed this motion.

Relief under Rule 41(d) is appropriate. Indeed, this Court in *Esquivel v. Arau*, 913 F. Supp. 1382 (C.D. Cal. 1996), awarded Rule 41(d) relief upon less

[1] Amazingly, Plaintiffs still failed to tell the court or the parties that they had filed the La Cuna II Action in the Central District.

egregious facts.[2] As in *Esquivel*, Plaintiffs' choice of the Southern District "as a forum was questionable, to say the least." *Esquivel*, 913 F. Supp. at 1386. Nothing ties the five Central District Projects to the Southern District, as Plaintiffs finally conceded in their motion practice after a month of intensive litigation, including a TRO application hours before the New Year's holiday. In addition, the fact that Plaintiffs attempted to tether five Central District Projects to one Southern District Project that *already* had been preliminarily enjoined two weeks beforehand underscores that their tactic was nothing but blatant improper forum-shopping.

In addition, just as in *Esquivel*, Plaintiffs "failed to present a persuasive explanation for the course of litigation described above, and it is clear that defendants have incurred needless expenditures as a result." *Id.* at 1386. Genesis Solar was forced to litigate a motion to dismiss and opposition to a TRO Application in a case that never should have been filed against it in the Southern District in the first place. Plaintiffs never told the court or Genesis Solar that they had filed an identical action against Genesis Solar and the other projects in the Central District. As a result, Genesis Solar needlessly incurred great expense until Plaintiffs finally dismissed their improperly filed action. Under these circumstances, as this Court previously held in *Esquivel*, "an award under Rule 41(d) is appropriate." *Id.*

II.

FACTUAL BACKGROUND

A. Genesis Project ROD.

On November 3, 2010, the BLM issued the ROD for the Genesis Project. *See* Declaration of Kristopher S. Davis ("Davis Decl."), Exh. 1 (Genesis Project ROD). No challenges were made on or about that time to the Genesis Project.

[2] *Esquivel*'s application to this case is more fully discussed in Part III.B., *infra*.

B. The Quechan Tribe Action.

On December 15, 2010, the United States District Court for the Southern District of California issued a preliminary injunction against the Imperial Project in the Quechan Tribe Action. *Id.*, Exh. 2 (Preliminary Injunction Order). The Quechan Tribe Action is limited to the Imperial Project. *Id.*

C. The La Cuna I Action.

1. The La Cuna I Complaint.

On December 27, 2010, Plaintiffs filed the La Cuna I Action. *Id.*, Exh. 3 (Complaint). The Complaint challenges the regulatory approvals for the Genesis Project, Calico Project, Ivanpah Project, Blythe Project, Imperial Project, and Chevron Project, under the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* ("APA"), for alleged violations of the National Historic Preservation Act, 16 U.S.C. §§ 470, *et seq.* ("NHPA"), the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* ("NEPA"), the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, *et seq.* ("FLPMA"), and the Native American Graves Protection & Repatriation Act, 25 U.S.C. §§ 3001, *et seq.* ("NAGPRA"). *Id.*, Exh. 3, ¶¶ 8, 13-192.

One project, the Imperial Project, is located in the Southern District. *Id.*, Exh. 4 (Imperial Project ROD) at 10 (Imperial County). The remaining five, the Genesis Project, the Ivanpah Project, the Chevron Project, the Calico Project and the Blythe Project, are located in the Central District (collectively, the "Central District Projects"). *Id.*, Exh. 1 (Genesis Project ROD) at 7 (Riverside County); Exh. E (Ivanpah Project ROD) at 7 (San Bernardino County); Exh. 6 (Chevron Project ROD) at 6 (San Bernardino County); Exh. 7 (Calico Project ROD) at 9 (San Bernardino County); Exh. 8 (Blythe Project ROD) at 8 (Riverside County).

Similarly, the RODs for each of the Central District Projects were issued by a BLM Field Office located within the Central District. *Id.*, Exh. 1 at 2 (Palm Springs South Coast Field Office); Exh. 5 at 2 (Needles Field Office); Exh. 6 at 2 (Barstow Field Office); Exh. 7 at 2 (Barstow Field Office); Exh. 8 at 2 (Palm

Springs South Coast Field Office).

The defendants to the Central District Project claims do not reside in the Southern District. The BLM and Ken Salazar and Robert Abbey, in their official capacities of Secretary and Director of the DOI and BLM, respectively, reside in Washington D.C. *See* www.doi.gov/index.cfm (DOI's office is located at 1849 C Street NW, Washington, DC 20240); www.blm.gov/wo/st/en/info/directory.html (Robert Abbey and the BLM's office is also located at 1849 C Street NW, Washington, DC 20240). Teri Raml in the official capacity of District Manager of the California Desert District of the United States Bureau of Land Management resides in Riverside County. *See* www.blm.gov/ca/st/en/info/directory/fo-addresses.html (Teri Raml's office is located at 22835 Calle San Juan De Los Lagos, Moreno Valley, California 92553 in Riverside County). John Kalish in the official capacity of Field Manager of the Palm Springs South Coast Field Office of the United States Bureau of Land Management resides in Riverside County. *See id.* (John Kalish's office is located at 1201 Bird Center Drive, Palm Springs, California 92262 in Riverside County). Rusty Lee in the official capacity of Field Manager of the Needles Field Office of the United States Bureau of Land Management resides in San Bernardino County. *See id.* (Rusty Lee's office is located at 1303 S. Highway 95, Needles, California 92363 in San Bernardino County). Roxie Trost in the official capacity of Field Manager of the Barstow Field Office of the United States Bureau of Land Management resides in San Bernardino County. *See id.* (Roxie Trost's office is located at 2601 Barstow Road, Barstow, California 92311 in San Bernardino County).

Thus, with respect to the Central District Project claims, there was no colorable connection with the Southern District. The property at issue is entirely located in the Central District; the alleged events and omissions occurred in the Central District; and the defendants all reside outside of the Southern District.

In addition, with the exception of the NAGPRA claim, the claims in the La

Cuna I Action challenging the approval of the Imperial Project were substantively identical to the claims brought in the prior-filed Quechan Tribe Action to enjoin the Imperial Project. Each case asserted APA claims based upon alleged violations of the NHPA, NEPA and FLPMA. *Cf. id.*, Exh. 9 (Quechan Complaint) at ¶ 10 with Exh. 3 at ¶ 7. Each case alleged that approval of the projects and amendment of the California Desert Conservation Area ("CDCA") Plan by the DOI and BLM was arbitrary and capricious under the APA. *Cf. id.* Exh. 9 at ¶ 83 with Exh. 3 at ¶ 95. Each case alleged that the project will result in undue impairment and degradation and violates the CDCA Plan under the FLPMA. *Cf. id.*, Exh. I at ¶¶ 90-91 with Exh. 3 at ¶¶ 93-95. Each case alleged that NEPA was violated because an inadequate cumulative impact analysis was performed and the Imperial Project was approved without the issuance of a programmatic EIS which adequately identified and evaluated the significance of the impact the projects would have on the environment. *Cf. id.*, Exh. 9 at ¶¶ 98-100 with Exh. 3 at ¶¶ 85-88. Each alleged violation of NHPA by executing the ROD before completion of the Section 106 consultation process. *Cf. id.*, Exh. 9 at ¶¶ 114-115 with Exh. 3 at ¶¶ 100-101.

In sum, Plaintiffs in the La Cuna I Action added nothing new to the litigation relating to the Imperial Project. The Imperial Project claims were purely duplicative of the claims already asserted and successfully litigated by the Quechan Tribe. Plaintiffs' joinder of these purely duplicative claims with new claims challenging the five Central District Projects constituted blatantly improper forum-shopping. As discussed below, Plaintiffs' forum-shopping was further underscored by several additional facts, including that they filed a TRO Application seeking to enjoin the Imperial Project that already had been preliminarily enjoined by the Southern District.

2. Plaintiffs' Notice of Related Case and TRO Application.

On December 28, 2010, Plaintiffs filed a Notice of Related Case that asserted that the La Cuna I Action is related to the earlier-filed Quechan Tribe Action in a

naked attempt to have it assigned to the same judge. *Id.*, Exh. 10 (Notice of Related Case).

On December 30, 2010, hours before the New Year's Holiday, the Plaintiffs filed a TRO Application asking the court, on the first business day following New Year's weekend, to immediately enjoin any work on the six named solar energy projects, including the Genesis Project. *Id.*, Exh. 11 (TRO Application). Plaintiffs' TRO Application was meritless because there was no threat of irreparable harm. Indeed, it is difficult to understand why Plaintiffs suddenly sought an immediate 10 day injunction at all. Plaintiffs waited almost *two months* after the BLM issued its November 3, 2010 ROD before filing their TRO Application. *Id.*, Exhs. 1 & 11. Plaintiffs did not even file their TRO Application together with their December 27, 2010 complaint, but instead waited until immediately before the New Year's Holiday to file their December 30, 2010 TRO Application, knowing that the Court was not even in session until January 3, 2011. *Id.*, Exh. 11. On these facts, Plaintiffs' insistence of exigent circumstances warranting a 10 day injunction lacked credibility.

Moreover, Plaintiffs' TRO Application failed to identify any specific harm they were seeking to prevent, other than to assert their general intention "to protect priceless, irreplaceable cultural resources[.]" *Id.*, Exh. 12 (Plaintiffs' 1-4-11 Opp'n to *Ex Parte* Application), 2:7. In their briefing, they did not identify a single "irreplaceable cultural resource" that would be harmed if their application for a 10 day restraining order was denied.

3. Genesis Solar's Intervention in the La Cuna I Action.

On January 3, 2011 (*i.e.*, the first business day after the New Years' weekend), Genesis Solar filed the following documents: (1) motion to intervene; (2) preliminary opposition to Plaintiffs' TRO Application; and (3) motion to dismiss for improper venue. *Id.*, Exhs. 13 thru 15. On January 5, 2011, the Court issued a Order that granted Genesis Solar's motion to intervene and set an expedited

briefing schedule on its motion to dismiss regarding venue. *Id.*, Exh. 16 (January 5, 2011 Order).

On January 13, 2011 – the day before Plaintiffs filed their opposition to the motion to dismiss – Plaintiffs filed the La Cuna II Action[3] and another duplicate case, titled *La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee, et al. v. United States Department of Interior, et al.*, challenging the Chevron Project approvals, in the United States District Court, Central District of California, Case No. CV 11-00395 ODW (OPx). *Id.*, Exhs. 17 (La Cuna II Action Complaint), Exh. 18 (Chevron Project Complaint).

On January 14, 2011, Plaintiffs filed their opposition to the motion to dismiss in the La Cuna I Action that, significantly, did consent to the "transfer" of the claims against Genesis Solar to the Central District. *Id.*, Exh. 19 (Plaintiffs' Opp'n to Motion to Dismiss), 2:6-12. Shockingly, Plaintiffs' opposition did not mention the La Cuna II Action or any of their other newly-filed complaints. *Id.* Moreover, Plaintiffs never filed a Notice of Related Case regarding the La Cuna II Action even though Plaintiffs were obviously aware of this duty because Plaintiffs promptly filed a Notice of Related Case in the La Cuna I Action in an attempt to get the case deemed related to the Quechan Tribe Action.

On January 20, 2011, Plaintiffs filed their First Amended Complaint in the La Cuna II Action. *Id.*, Exh. 20. Again, Plaintiffs failed to notify the Court or parties in the La Cuna I Action of the filing. On January 14 and 21, 2011, in accordance with the Court's January 5, 2011 Order, Genesis Solar filed its supplemental opposition to the TRO Application and its reply brief in support of its

[3] The only differences between La Cuna II Action and the La Cuna I Action were that two new individual plaintiffs were added, one new claim was added, two solar projects, the Imperial Project and Chevron Project, were dropped (and were sued by these same plaintiffs in separate lawsuits), and the project owners were named as defendants (whereas before they had to intervene as defendants).

motion to dismiss, respectively. *Id.*, Exhs. 21 (Supp. Opp'n) & 22 (Reply Brief).

On January 21, 2011, Plaintiffs filed the following in the La Cuna I Action: (1) a First Amended Complaint that dropped all of the Central District Projects; (2) an opposition to the motion to dismiss that argued the motion is moot because the Central District Projects were dropped; and (3) Plaintiffs' notice of withdrawal of the TRO Application. *Id.*, Exhs. 23 (First Amended Complaint), 24 (Opp'n to Motion(s) to Dismiss) & 25 (Notice of Withdrawal). It was not until that date, eight days after they filed the La Cuna II Action, and almost a month after they filed the La Cuna I Action, that the Plaintiffs finally apprised the court and parties in the La Cuna I Action that Plaintiffs would no longer pursue their claims against the Central District Projects. *Id.*, Exh. 23. Yet, the Plaintiffs *still* did not notify the La Cuna I Action Court or parties of the other Central District complaints that they had filed.

On January 25, 2011, Plaintiffs filed a Notice of Voluntary Dismissal in the La Cuna I Action. *Id.*, Exh. 26 (Notice of Dismissal). On January 25, 2011, the Court issued an Order that provides, in pertinent part:

> IT IS FURTHER ORDERED that, pursuant to Plaintiffs' Notice of Voluntary Dismissal (ECF No. 108) and Federal Rule of Civil Procedure 41(a)(1)(A)(i), Defendant-Intervenor Genesis Solar and Palo Verde Solar I, LLC are dismissed without prejudice…The request by Genesis Solar for "a briefing schedule for a Rule 41(a)(2) hearing…is denied without prejudice to raise the issue before ***any court*** in which Plaintiffs file an action ***based on or including the same claim against the same defendant***." Fed. R. Civ. P. 41(d).

Id., Exh. 27 (January 25, 2011 Order), 1:17-26 (emphasis added).

D. The La Cuna II Action.

1. Genesis Solar Filed a Rule 41(d) Motion.

On January 20, 2011, Plaintiffs filed their First Amended Complaint in the La Cuna II Action, which added Genesis Solar, among others, as a defendant in the case. *Id.*, Exh. 19. On January 27, 2011, Genesis Solar filed a Notice of Related

Case in the La Cuna II Action on the basis that the La Cuna II Action was related to a previously-filed action against Genesis Solar titled *California Unions for Reliable Energy, et al. v. United States Dept. of the Interior, et al.*, CV 10-9932-GW-SSx ("CURE Action"). *Id.* Exh. 28 (Notice of Related Case). On February 16, 2011, this Court entered an Order consenting to the transfer of the La Cuna II Action to this department. *Id.*, Exh. 29 (Order re Transfer).

On February 17, 2011, Genesis Solar filed a Motion to Recover Fees and Costs Incurred in the Previously Dismissed Action and Stay the Proceeding pursuant to Rule 41(d) (the "Rule 41(d) Motion"). *Id.*, Exh. 30 (Rule 41(d) Motion). This Court took the Rule 41(d) motion off-calendar so as to first address issues concerning the relationship between multiple actions filed by Plaintiffs, and whether the La Cuna II action should be severed. *Id.*, Exhs. 31 (February 23, 2011 Order), 32 (February 28, 2011 Order), 33 (March 3, 2011 Order).

2. The Court Severed the La Cuna II Action, Dismissing Genesis Solar from the Improperly Filed La Cuna II Complaint.

On April 7, 2011, this Court entered an Order that severed the La Cuna II Action and dismissed all of the claims pertaining to the Genesis Project. *Id.*, Exh. 34 (April 7, 2011 Order) at 5 ("order dismissing the claims in the La Cuna II Plaintiffs' First Amended Complaint pertaining to all but the Ivanpah Project"). This Court stated that Genesis Solar could re-file its Rule 41(d) Motion if the Plaintiffs filed another action against it, and ordered that "[t]he Court by making this ruling is not attempting to decide any merits and the ruling is made 'no harm, no foul' as to all parties on both sides." *Id.*, Exh. 34 at 1.

E. The La Cuna III Action.

On September 15, 2011, Plaintiffs re-filed their action against Genesis Solar involving the same Plaintiffs (as well as two additional individuals) and the same Defendants (as well as additional Federal Defendants). This action and the La Cuna I Action both assert APA claims for alleged violations of NEPA, and each

seek judgment: (i) declaring that the Genesis Project's approval was illegal; (ii) rendering the approval null and void; and (iii) obtaining injunctive relief to prohibit Defendants from taking any action in furtherance of the Project until they comply with NEPA. Compare La Cuna III Complaint ("Compl."), ¶¶ 25-29, Prayer for Relief to Davis Decl., Exh. 3, ¶¶ 49-59, Prayer for Relief. Both actions seek an order vacating Genesis Solar's ROD, including the CDCA Plan Amendment and right-of-way grant, and further seek an order enjoining Genesis Solar from any ground disturbing activities authorized under a Notice to Proceed for the Genesis Project unless and until the DOI complies with the substantive and procedural mandates of NEPA. *Id.*

Plaintiffs have added claims in this action for alleged violations of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, et seq. ("RFRA"), the Energy Policy Act of 2005, as amended by the American Recovery and Reinvestment Act of 2009, 42 U.S.C. §§ 16511, *et seq*. ("EPA/ARRA"), and the American Indian Religious Freedom Act, 42 U.S.C. § 1996 ("AIRFA"). As will be demonstrated in Genesis Solar's concurrently filed motion to dismiss, these added claims should fail on their face but were added as window dressing to provide Plaintiffs with an argument that this action was a different action than the earlier action. The attempt should fail. As discussed below, these actions are based on the same set of circumstances, assert the same NEPA claim and include demands for the same relief against the same project. *See Id.*, Exh. 27 (January 25, 2011 Order), 1:17-26.

Accordingly, pursuant to Rule 41(d), the January 25, 2011 Order in the La Cuna I Action and the April 7, 2011 Order in the La Cuna II Action, Genesis Solar respectfully requests an award of costs and fees incurred in the La Cuna I Action and a stay of this proceeding until Plaintiffs comply.

III.

ARGUMENT

A. Plaintiffs' Conduct Clearly Satisfies the Rule 41(d) Standards.

Rule 41 provides:

> If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court: (1) may order the plaintiff to pay all or part of the costs of that previous action; and (2) may stay the proceedings until the plaintiff has complied.

Fed. R. Civ. Proc. 41(d)(1) & (2). As this Court previously has held, "[n]othing in the language of Rule 41(d) or the case law suggests that a defendant must show 'bad faith'… Instead, the court should simply assess whether a plaintiff's conduct satisfies the requirements of Rule 41(d), and whether the circumstances of the case warrant an award of costs to prevent prejudice to the defendant." *Esquivel*, 913 F. Supp. at 1388.

Specifically, Rule 41(d) applies "[i]f a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant." Genesis Solar was voluntarily dismissed by Plaintiffs in the previous action. *See* Davis Decl., Exh. 27, 1:17-20 ("IT IS FURTHER ORDERED that, pursuant to Plaintiffs' Notice of Voluntary Dismissal (ECF No. 108) and Federal Rule of Civil Procedure 41(a)(1)(A)(i), Defendant-Intervenor Genesis Solar and Defendant Palo Verde Solar I, LLC are dismissed without prejudice…"). Moreover, the instant action is based on and includes the same claims against Genesis Solar as the previously dismissed action: both actions assert APA claims for alleged violations of NEPA, and both actions seek judgments (i) declaring that the Genesis Project's approval was illegal, (ii) rendering the approval null and avoid, and (iii) imposing injunctive relief to prohibit Defendants from taking any action in furtherance of the Project until they comply with NEPA. *See* Compl., ¶¶ 25-29, Prayer for Relief; Davis Decl. Exh. 3, ¶¶ 49-59, Prayer for Relief.

Plaintiffs' added claims in this case for alleged violations of the RFRA, the EPA/ARRA, and the AIRFA, do not obviate the fact that this action, just like the La Cuna I Action, asserts NEPA violations under the APA and, moreover, seeks an order vacating Genesis Solar's ROD, including the CDCA Plan Amendment and right-of-way grant, and further seeks an order enjoining Genesis Solar from activities authorized under a Notice to Proceed for the Genesis Project unless and until the DOI complies with the substantive and procedural mandates of NEPA. *See Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010) (granting Rule 41(d) motion where plaintiff's second action added claims). Accordingly, Rule 41(d)'s threshold requirements are met.

B. The Circumstances of these Serial Filings and Dismissals Warrant an Award of Costs Under Rule 41(d).

"The language of Rule 41(d) clearly indicates that it conveys 'broad discretion' on federal courts to order…payment of costs." *Esquivel*, 913 F. Supp. at 1386. "Rule 41(d) is meant not only to prevent vexatious litigation, but also to prevent forum shopping, especially by plaintiffs who have suffered setbacks in one court and dismiss to try their luck somewhere else." *Rogers v. Wal-Mart Stores, Inc.*, 230 F. 3d 868, 874 (6th Cir. 2000) (internal quotation marks omitted).

Esquivel is particularly instructive on this issue. In *Esquivel*, prior to the filing of her Central District of California action, the plaintiff had filed two actions in New York, one in state court and one in federal court. Both sides stipulated to a stay of the New York state court action pending a decision in the federal court action on defendants' motion to dismiss for lack of personal jurisdiction and improper venue. On September 29, 1995, after the motion to dismiss was filed in New York federal court, the plaintiff filed her Central District of California action alleging related claims. On October 17, 1995, the day the plaintiff's opposition to the motion to dismiss was due, the plaintiff filed a voluntary dismissal without prejudice under Rule 41(a)(1) of the New York federal action.

Defendants made a Rule 41(d) motion in the Central District action for their costs incurred in the New York federal case and a stay of the Central District action pending plaintiff's payment of the costs. Defendants contended that the plaintiff's filing of the Central District action and dismissal of the New York action constituted improper forum-shopping. *Esquivel*, 913 F. Supp. at 1386. In its ruling, the Central District Court agreed:

> **Esquivel's choice of the Southern District of New York as a forum was questionable, to say the least.** As an initial matter, it is clear that the plaintiff bears the responsibility of determining the appropriate forum in which to prosecute her case [citation omitted], and of establishing that personal jurisdiction exists. [citation omitted] Defendants' motion to dismiss in the Southern District action pointed out that neither party is a citizen or resident of New York, the complaint made no allegations of acts taking place in New York giving rise to the claims, the various agreements at issue were all executed outside of New York, and none of the witnesses or documents are in New York…**Her decision to refile her action in the Central District of California and then file the notice of dismissal in the Southern District action without responding to defendants' motion to dismiss for lack of personal jurisdiction appears to have been a recognition that her suit in the Southern District was vulnerable on the grounds asserted in the motion.**

Id. at 1387 (emphases added). The Central District Court further stated:

> **Nothing in the language of Rule 41(d) or the case law suggests that a defendant must show "bad faith"** before a district court can order payment by a plaintiff of costs incurred in a voluntarily-dismissed previous action. Instead, **the court should simply assess whether a plaintiff's conduct satisfies the requirements of Rule 41(d), and whether the circumstances of the case warrant an award of costs to prevent prejudice to the defendant.** Here, Esquivel has failed to present a persuasive explanation for the course of litigation described above, and it is clear that defendants have incurred needless expenditures as a result. **Thus, an award under Rule 41(d) is appropriate**.

Id. at 1388 (emphases added).

The situation here is analogous to that of *Esquivel*, and, indeed, is even more egregious. In the previously dismissed La Cuna I Action, Plaintiffs filed a TRO Application to enjoin six completely different, geographically separated, solar

energy projects. Five of the six projects, including the Genesis Project, are physically located in the Central District of California. Plaintiffs added to their Complaint one Southern District of California project, the Imperial Project, which already was preliminarily enjoined by the same court on December 15, 2010, in the Quechan Tribe Action.

The claims relating to the six different projects were not substantially related, and there was no legitimate basis for Plaintiffs to have joined them together. The joinder of claims relating to the Imperial Project, and the Field Manager of the El Centro Field Office which issued the Imperial Project ROD (Margaret Goodro) appeared to serve no other purpose than to venue these geographically far flung claims in the Southern District before the Court that recently had enjoined the Imperial Project. There would be no basis for Plaintiffs to bring claims relating to the other five projects in the Southern District. All of the events giving rise to these claims occurred in the Central District where the respective projects and BLM field offices are located, and all of the real property subject to these claims is located in the Central District. As in *Esquivel*, Plaintiffs' "choice of the Southern District of [California] as a forum was questionable, to say the least." *Esquivel*, 913 F. Supp. at 1386.

Moreover, the BLM issued the ROD for the Genesis Project on November 3, 2010, nearly *60 days before Plaintiffs' filed their December 30, 2010 TRO Application*. Plaintiffs' TRO Application, filed two months after the BLM issued the ROD for the GSEP, demonstrated no urgency. Rather, it was a calculated attempt to engage in forum-shopping and to tether five competing solar energy projects to the already-adjudicated Quechan Tribe Action and to enjoin all of these geographically disparate projects by abbreviated proceedings.

Plaintiffs contended that their Complaint was being asserted jointly against all of these disparate projects because they all are within the vast CDCA designated by Congress in 1976. *See* Davis Decl., Exh. 11, 2:4-24. However, the CDCA is ***25***

million acres in size, in comparison with the six discrete projects that range from approximately 422 acres in size to approximately 7,025 acres in size – and Genesis Solar was granted a Record of Decision for approximately 1,746 acres, making it among the smaller of these projects. Plaintiffs' premise in joining these disparate and competing projects in a single action because they all are in the CDCA is nonsensical considering the small size of these projects being built in three different counties. The entitlement process was different for each of the six separate projects. Each project is the subject of a different ROD. The RODs for the six projects were issued by four different field offices, and were thus handled by different personnel. Each project involves a different piece of real property that presents a unique environment. Different groups have varying interests in the respective project sites. The process by which each project was approved is necessarily distinct.

Here, as in *Esquivel*, Plaintiffs "failed to present a persuasive explanation for the course of litigation described above, and it is clear that defendants have incurred needless expenditures as a result." *Esquivel*, 913 F. Supp. at 1386. Genesis Solar was forced to intervene in a case that should have never been filed against it in the Southern District in the first place. Plaintiffs never communicated to the Southern District Court or Genesis Solar that they had filed an identical action against Genesis Solar and the other projects in the Central District. As a result, Genesis Solar was forced to needlessly incur expenditures in its motion to dismiss the case on venue grounds and its opposition to the TRO Application that was ultimately withdrawn. Under these circumstances, "an award under Rule 41(d) is appropriate." *Id.*

C. As in *Esquivel*, Genesis Solar Is Entitled to Recover Its Expenses and Attorneys' Fees Incurred in the Improper La Cuna I Action.

In *Esquivel*, this Court held: "It is the decision of the Court that defendants are entitled to both expenses and attorneys' fees that are reasonably incurred and

that will not contribute toward defendants' defense in the present case." *Id.* at 1392. Here as well, Genesis Solar's expenses and attorneys' fees were reasonably incurred in the La Cuna I Action. *See* Davis Decl., ¶¶ 35-37.

First, Genesis Solar was not a named defendant in the Complaint. *Id.*, Exh. C. As a result, Genesis Solar had to move to intervene to defend the Plaintiffs' alleged challenges to its solar project, and to oppose the TRO Application for an immediate injunction of work on the Genesis Project so that its agreements, commitments, legal rights and other interests could be given proper consideration and appropriate protection by the Court.

Moreover, Plaintiffs conceded that their La Cuna I Action claims were entirely improper, forcing a motion to dismiss. As in *Esquivel*, Plaintiffs' "decision to refile [their] action in the Central District of California and then file the notice of dismissal in the Southern District action without responding to defendants' motion to dismiss for lack of personal jurisdiction appears to have been a recognition that [their] suit in the Southern District was vulnerable on the grounds asserted in the motion." *Esquivel*, 913 F. Supp. at 1387. Accordingly, Genesis Solar's expenses and attorneys' fees were reasonably incurred in the La Cuna I Action.

Genesis Solar is entitled to recover the full amount sought because the costs and fees incurred were associated with work that will not be useful to Genesis Solar in this action. *Id.* at 1387. Genesis Solar's costs and fees were largely incurred in the following: (1) motion to intervene; (2) motion to dismiss for improper venue; and (3) opposition to TRO Application. *See* Davis Decl., ¶¶ 35-37. Genesis Solar's work on the motion to intervene is not useful in this action. After Genesis Solar filed its motion to intervene in the La Cuna I Action, the Ninth Circuit drastically changed the intervention law in NEPA cases, and made it much easier for real parties in interest to intervene. *See The Wilderness Society v. USFS*, 630 F. 3d 1173 (9th Cir. 2011) (abandoning the "none but federal defendant" rule in NEPA cases).

Genesis Solar's work on the motion to dismiss for improper venue likewise is not useful in this case, given that this action was filed in the Central District which is the proper venue for challenges raised against the Genesis Project. Nor is Genesis Solar's work opposing the cynically filed and then withdrawn TRO Application useful in these proceedings. Much of the opposition focused on the tortoise fencing at the Genesis Project and how that could not support a claim of imminent irreparable harm. *See* Davis Decl., Exh. 35, ¶¶ 2, 4, 5. The tortoise fencing is concluded and no TRO Application has been filed in this case. The work done in opposing the TRO Application in the La Cuna I Action is not useful because the project is at a different phase of development and any work done in analyzing the previous phases is of no value in this case. Accordingly, Genesis Solar is entitled to recover the full amount sought because the costs and fees incurred were associated with work that will not be useful to Genesis Solar in this action.

D. The Court Should Stay This Action Until Plaintiffs Comply with the Award Order.

"The Court has discretion to order a stay of the instant action pending plaintiff's payment of the costs and fees imposed under Rule 41(d)." *Esquivel*, 913 F. Supp. at 1393. In *Esquivel*, this Court stated that "Esquivel has not represented that she would be unable to pay an award of costs, nor has she asserted that she would be harmed in any way by a stay of the proceedings. The Court therefore finds a stay appropriate." *Id.*

This situation is analogous. Plaintiffs have not represented that they would be unable to pay an award of costs, nor have they asserted that they would be harmed in any way by a stay of the proceedings. Indeed, the very fact that Plaintiffs waited about two months after the Genesis Project ROD was issued to file the La Cuna I Action, amended the complaint twice in the La Cuna II Action before serving it, and now have waited another five months before filing this action,

underscores that Plaintiffs would not be harmed by a stay. Given these circumstances which are remarkably similar to *Esquivel*, a stay is appropriate.

IV.

CONCLUSION

Based on the foregoing and the concurrently filed Declaration of Kristopher S. Davis, Genesis Solar respectfully requests that the Court order an award of costs and fees incurred in the La Cuna I Action under Rule 41(d) and stay this proceeding until such award is paid to Genesis Solar.

Dated: November 21, 2011

Respectfully submitted,

DRINKER BIDDLE & REATH LLP

By: /s/ George T. Caplan
George T. Caplan
Attorneys for Defendant
GENESIS SOLAR LLC

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Drinker Biddle & Reath LLP, 1800 Century Park East, Suite 1400, Los Angeles, California 90067.

On **November 21, 2011**, I served the foregoing document described as: **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GENESIS SOLAR LLC'S MOTION TO RECOVER FEES AND COSTS INCURRED IN THE PREVIOUSLY DISMISSED ACTION AND STAY THE PROCEEDING** on the interested parties in this action by transmitting a copy as follows:

SEE ATTACHED SERVICE LIST

__X__ **By ELECTRONIC FILING** (I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel denoted on the attached Service List.)

_____ **By PERSONAL SERVICE**

_____ by personally delivering such envelope to the addressee.

_____ by causing such envelope to be delivered by messenger to the office of the addressee.

_____ **By UNITED STATES MAIL** (I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.)

_____ **By OVERNIGHT DELIVERY** (by causing such envelope to be delivered to the office of the addressee by overnight delivery via Federal Express or by other similar overnight delivery service.)

_____ **By FAX TRANSMISSION**

_____ **By E-MAIL OR ELECTRONIC TRANSMISSION**

_____ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

__X__ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on **November 21, 2011**, at Los Angeles, California.

SHANTA TEEKAH	/s/ Shanta Teekah
Name	Signature

SERVICE LIST

La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee, et al. v. United States Department of the Interior, et al. USDC Case No. 5:11-cv-01478-GW-SS

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